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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ELLIOTT SCOTT GRIZZLE, Defendant and Appellant.	D072975 (Super. Ct. No. SCD267438)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed in part; sentence vacated; remanded with directions.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Elliott Scott Grizzle of felony murder (Pen. Code,[1] §§ 187, subd. (a), 189; count 1); two counts of first degree robbery in concert with two or more other people in an inhabited dwelling (§ 211; counts 2, 3); and burglary (§ 459; count 4). As to counts 2 and 3, the jury found true that the robbery occurred in an inhabited dwelling within the meaning of section 212.5, subdivision (a) and Grizzle committed the robbery voluntarily while acting in concert with two or more other people inside an inhabited dwelling within the meaning of section 213, subdivision (a)(1)(A). As to count 4, the jury also found true that the burglary occurred in an inhabited dwelling within the meaning of section 460 and another person other than an accomplice was present in the residence during the commission of the burglary within the meaning of section 667.5, subdivision (c)(21).

In a bifurcated proceeding, Grizzle admitted he suffered probation denial priors (§ 1203, subd. (e)(4)), a prison prior (§§ 667.5, subd. (b), 668), and two prior strikes (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)).

The trial court sentenced Grizzle to 159 years to life, consisting of: (1) 75 years to life plus 10 years for the serious felony priors for count 1; (2) 27 years to life plus 10 years for the serious felony priors for count 2; (3) 27 years to life plus 10 years for the serious felony priors for count 3. The court struck the prison prior and stayed the sentence on count 4 pursuant to section 654.

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1 Statutory references are to the Penal Code unless otherwise specified.

Grizzle appeals, arguing: (1) instructional error warrants reversal; (2) the trial court improperly excluded evidence of a Drug Enforcement Agency (DEA) investigation of some of the victims in this matter; (3) the court prejudicially erred in admitting evidence of the arrests of two individuals who allegedly were involved in the subject crimes; (4) substantial evidence does not support his convictions; and (5) cumulative error warrants reversal. We conclude none of these claims have merit. In addition, Grizzle claims *Brady*[2] error and asks this court to independently review a redacted exhibit. After doing so, we find no *Brady* error.

However, while this appeal was pending, Grizzle moved to file a supplemental brief because of changes in existing law that went into effect January 1, 2019. We granted the motion and requested supplemental briefing from the People to address the new issues Grizzle raised.

In his supplemental brief, Grizzle makes two primary arguments. First, he asserts that Senate Bill No. 1393 amended sections 667, subdivision (a) and 1385 to allow the trial court discretion to strike an enhancement under section 667, subdivision (a). Grizzle maintains, and the People agree, this matter must be remanded to allow the superior court to resentence Grizzle consistent with this change in the law. We thus will vacate Grizzle's sentence and remand this matter for resentencing consistent with this opinion.

Second, Grizzle maintains that Senate Bill No. 1437, which changes the elements of felony murder, requires this court to conditionally reverse the judgment to allow him

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2 *Brady v. Maryland* (1963) 373 U.S. 83.

to seek relief from the sentencing court under the bill. In contrast, the People argue this court can take no action under Senate Bill No. 1437 because Grizzle must follow the procedure set forth in section 1170.95 (a provision added by Senate Bill No. 1437) and petition the superior court for relief. As we explain below, we agree with the People. If Grizzle believes he is entitled to relief under Senate Bill No. 1437, he must first seek relief with the superior court.

In summary, we vacate Grizzle's sentence and remand this matter back to the superior court for resentencing. In all other respects, we affirm the judgment. Nothing in this opinion limits Grizzle's rights under Senate Bill No. 1437 to seek relief in the superior court.

FACTUAL BACKGROUND

Prosecution

On May 11, 2016, B.A. and his housemates, B.W., W.S., S.P., and J.P. resided on Tommy Drive in San Diego (Tommy Drive residence). On the afternoon of May 11, S.P. returned to the house after doing some grocery shopping. His housemates were not at home. S.P. brought the groceries inside the house, set them down in the kitchen, went into the "back living room" at the rear of the house, and checked his phone for a text message.

S.P. heard the front door open, and a group of three to five men walked through the door in a single file. The man in front pointed a gun in S.P.'s face and told him to lie down on the ground with his hands behind his back. S.P. described the gunman as being

in his late 30's or early 40's, six-feet tall, not much hair on his head, and clean shaven.[3] He could not describe the other men.

The men asked S.P. questions about everyone who lived in the house, such as what their schedules were, what jobs they had, and what cars they drove. The men were especially interested in B.A. The men also asked about large amounts of money and marijuana. S.P. told them that he did not know anything about drugs or money because he never saw anything like that in the house.

S.P. could hear the men going through the house, ransacking it. He knew there were at least three men in the house because he could hear two men whispering to each other while someone else was going through the house. He heard the men taking the TV off the wall of the back living room. At some point, the men took his cell phone and the keys to his car.

After about 45 minutes to an hour, the men stood S.P. up, covered his face with some type of cloth, and moved him from the back living room to the adjoining "front living room." S.P.'s hands were restrained with some PlayStation cords and painter's tape. After S.P. was moved, he heard the men continue to go through the house. He heard the TV slam on the ground and heard one of the men say, "We're not going to be taking that with us."

Eventually, B.W. came through the front door. When B.W. entered the house, a man put a gun to his head and ordered him to get on the ground. After B.W. went to the

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3 At trial, S.P. confirmed that Grizzle was not the gunman.

ground, he was hit in the back of the head with the gun, and a T-shirt was placed over his head. B.W. believed there were four or five men in the house although he only saw the gunman. The men immediately asked B.W. where B.A. was, about the location of the money and marijuana, and who lived there. The men took B.W.'s credit cards, his identification, the keys to his Cadillac Escalade, and his cell phone. B.W. told the men his ATM personal identification number (PIN), and then someone left the house.

B.W.'s hands were bound with tape and a PlayStation cord. Initially, B.W. was on the ground near the front door, but then he was moved several feet into the front living room, close to a computer desk. He heard someone at the computer desk, rummaging through the paperwork and asking questions about B.A.'s papers. He also heard rummaging throughout the whole house and the garage.[4]

At one point, one of the men said something like, "Larry said it's wrong" regarding the ATM PIN number. When the man or men who left the house returned, a gun was put to B.W.'s head again because the men thought that B.W. had given them the wrong PIN number. B.W. insisted that he gave them the right number and suggested that they had tried to take out too much money. Someone asked B.W. if he had ever dug a ditch.

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[4] Photographs taken inside the Tommy Drive residence show that the house was ransacked: throughout the house and garage, cabinet doors were left open, drawers were pulled out, and items were strewn all over the floor. Multiple pieces of luggage were left in the kitchen. A garment bag full of clothes was found on a couch in the back living room. A large flat screen TV was resting on a couch in the front living room. Under a pile of items in the hallway, officers discovered a pillowcase that contained a couple of clear plastic baggies of marijuana, a cell phone, an iPad, several credit cards belonging to B.A., and a credit card and California identification belonging to B.W. A bag of marijuana was left behind the front door.

S.P. heard the men eating cereal and opening candy. The men asked S.P. if the beer in the refrigerator was nonalcoholic. S.P. heard a beer bottle being opened and heard somebody drinking liquid. B.W. heard the opening of beer bottles (perhaps two) and heard the men say that they had never had that type of beer before. Both S.P. and B.W. also heard someone "roasting" drugs. There was no smell of marijuana. S.P. thought the men were smoking methamphetamine. B.W. thought that the man doing drugs was at the computer desk.

About an hour after B.W. arrived at the house, B.A. walked through the front door. There was a struggle, and a man said, "Hey, [B.A.], how you doing? We've been waiting for ya." The men then asked about money, the "grow," and whether B.A. had any storage units. B.A. said that all he had was the little sprouts in the backyard and what was in a shoebox. The men questioned B.A. for several more minutes. Then there was another struggle, followed by four to six gunshots.

S.P. did not hear any noise after the gunshots, and, after a moment, took the cover off his eyes. He found B.W. and helped him get free of his restraints. S.P. and B.W. searched the inside of the house and then went outside, where they saw B.A. lying face first on the side of the driveway. S.P. turned B.A. over and saw that he had been shot, blood was pumping out everywhere as B.A. was gasping for breath. S.P. tried to render aid while B.W. went to find a neighbor to call 911. Eventually, a police officer arrived at the house.

A neighbor, who lived one block away from the house, heard two pops that sounded like gunshots a little before 3:00 p.m. He walked into his backyard to

investigate but did not see anything. He turned around to go back in his house and then he heard somebody scream, "Help me." He looked down over his fence and saw a man without a shirt roll another man over onto his back on the driveway. The neighbor ran back into his house to call 911. The neighbor saw another man in a blue shirt come out of the house and saw one of the men performing CPR on the man on the ground. The police arrived three to four minutes later.

B.A. was shot three times. He suffered scrapes on the left side of his face, right arm, left wrist and hand, left shoulder, and left knee. B.A. died from a gunshot wound to his thorax.

Four bullet casings were recovered from the Tommy Drive residence. One casing was in the threshold of the front doorway, another was just inside the front door, and two were found in the front living room. Two bullets were identified at the crime scene: one was in the wall of the entryway, and the other was found underneath B.A. when he was turned over for examination. During B.A.'s autopsy, a damaged bullet was recovered from B.A.'s left buttock, and an additional bullet was recovered from B.A.'s left arm.

Criminalist Lisa Wilson examined the four casings and concluded that all the cartridges were 9-millimeter Luger caliber and were all fired by the same gun, a pistol. Wilson also performed examinations of the three bullets and concluded that they were fired by the same gun as well.

Criminalist Adam Dutra inspected the crime scene and performed a firearm trajectory test. Dutra determined that one bullet originated from inside the living room, struck the north wall of the front living room, traveled downwards in a northeast

direction, exited the adjacent west wall of the entryway, crossed the entryway, and entered the east wall of the entryway, where it became lodged. Another bullet impacted the edge of the front door just above the strike plate and entered the door, tearing apart the wood and exterior surface of the door. The door had to have been open for that damage to occur. The trajectory of the bullet was from the interior edge of the door to the exterior edge of the door, as if it was exiting the home.

Dutra concluded that at least three shots occurred inside the house. Two shots were likely fired in the front living room, and a third one was fired either toward the east side of the living room or in the entryway. Based on the position of the bullet wound to B.A.'s hip/buttock area and the damage to the bullet that was removed from his buttock, the bullet that struck his hip/buttock was the same one that went through the edge of the door. B.A. would have been in the threshold of the door when he was struck.

Police obtained surveillance footage from a U.S. Bank location less than a mile away from the Tommy Drive residence. The footage, which was captured at about 2:00 p.m. on May 11, showed a man driving B.W.'s black Escalade through the drive-thru and using the ATM machine but not taking out any money. Records for B.W.'s Discover card show that the card was used three times on May 11; each transaction was a failed attempt to withdraw $500. Records for B.W.'s Bank of America card show three failed transactions for $503 each on May 11. B.W.'s Bank of America card was also used at a nearby 7-Eleven that same day in an attempt to complete a transaction for $202.95. Video surveillance at the 7-Eleven captured images of a white male wearing a brown jacket and a black hat, but the man's face was not visible.

Records from a Days Inn & Suites in La Mesa show that Grizzle checked into the motel on May 10, 2016 and checked out on May 12, 2016. According to the registration papers, two adults stayed in the room. The car registered to the room was a Chevy Monte Carlo with the license plate number 7NNC272.

On May 16, 2016, Sergeant Rick Turvey was involved in a high speed chase and eventually arrested the driver, Lawrence Johnson. Johnson was driving the same Monte Carlo registered by Grizzle at the Days Inn & Suites. When the Monte Carlo was processed for evidence, two folders were removed from the pocket of the front passenger seat. One of the folders contained hospital documents for someone named Rachelle Stewart.

On May 19, 2016, Detective Dennis Josse was engaged in a high speed chase. The vehicle Josse was following eventually crashed, and the driver, Toren Nieber, was arrested. Detective Timothy Norris, who was investigating the Tommy Drive case, recognized Toren Nieber as the man captured on the U.S. Bank surveillance footage.

On June 16, 2016, Grizzle was arrested while driving in the parking lot of The Suites motel in Las Vegas. Inside the car Grizzle was driving, police found a keychain holding a key to a motel room as well as a key to a Volkswagen Jetta. There was a phone in Grizzle's pocket as well as an iPhone on the front passenger floorboard.

The motel room matching the key in Grizzle's possession was registered under the name "Karen Gonzalez." A receipt found in the room had the name "Gonzalez" on it. A female, Rachelle Stewart, was in the room.

Officers found the Volkswagen Jetta close to the motel room. The car had a Nevada license plate. An investigation revealed that a man named Charles Elliot rented the car from Payless Car Rental in San Diego on May 12, 2016. At the time the car was rented, it had a valid California license plate. Payless reported the car stolen after it was not returned.

After Grizzle was taken into custody and placed in Officer Brian Redsull's vehicle, he asked if the officers were from San Diego. Later, Redsull listened to a jail phone call between Grizzle and a woman. During the telephone conversation, Grizzle asked the woman how she knew that he had a warrant, and the woman explained that she checked two or three times a week. Grizzle said that he looked for the warrant as soon as he hung up but could not find it, and then 20 minutes later, he left the hotel room and "they smashed me."

On January 5, 2017, Deputy Gregory Ward conducted a search of Grizzle's jail cell. He found a piece of paper with the name Charles Elliot written on it.

Dutra performed DNA analysis on several items of evidence found at the crime scene. Reference samples were taken from Grizzle, Johnson, Nieber, B.A., B.W., S.P., Jesse, and W.S. Grizzle's DNA was found on several items in the Tommy Drive residence.

For example, Grizzle's DNA was found on the mouth area of an open beer bottle on the kitchen counter. The bottle was two-thirds full. Grizzle's DNA also was found on

the exterior of the bottle.[5] A black knit mask with eyeholes was found on the computer console in the front living room. Grizzle's DNA was found on the mask.[6] A glass pipe and green lighter were next to each other on a couch in the front living room. The pipe was the type of pipe used to smoke methamphetamine and appeared to have methamphetamine residue on it. DNA from Grizzle, Johnson, and Nieber was found on the pipe. Grizzle's DNA also was found on the lighter.

In addition, a black glove was discovered in the street in front of a home, which was across the street and diagonal from the Tommy Drive residence. Grizzle's DNA was found on the glove as well as inside it.

There was a Guess bag on one of the couches in the front living room. The Guess bag contained various items, including a box of disposable gloves and what appeared to be a used disposable glove. Grizzle's DNA was found on one of the disposable gloves.

A plastic glove was found on top of a toolbox on the floor of the front living room. Grizzle's DNA was found on this glove.

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[5] An open beer bottle was found on the floor by the green recliner in the front living room. The bottle was two-thirds full. Nieber's DNA was found on the mouth area of the bottle.

[6] Initially, the computer running the analysis ran out of memory and could not interpret the results. As such, Dutra removed one of the DNA markers from the interpretation so that the computer would have to do fewer computations and an interpretation could be achieved.

Finally, there was a bloodstain on the inside doorknob of the front door. A swab of the bloodstain indicated that the DNA came from a single individual, Grizzle. All the other individuals were excluded.

A criminalist extracted the telephone number and the carrier information from the iPhone found in the car Grizzle was driving when he was arrested. Sprint business records showed that the phone was registered to Mary Grizzle.

From May 10 through May 19, all the location data for the cell phone was in the San Diego region. On May 11, three times between 1:00 and 3:00 p.m., the phone utilized a cell tower 500 feet from the Tommy Drive residence. Between 3:00 and 6:00 p.m., there were multiple cell site activations in the La Mesa/Lemon Grove area. From 6:00 to 9:00 p.m., there were no cell site activations. From 9:00 p.m. to midnight, there were multiple cell site activations in the National City area.

The last cell site activation in San Diego was on May 19 at 4:46 a.m. After that, until May 23, all the cell site activations were in Buena Park (Orange County). On May 23, the phone activated a cell site in Lake Elsinore at 2:11 p.m. and a cell site in Corona at 9:42 p.m. On May 24 at 9:28 p.m., the phone activated a cell site in Nevada. On May 26 at 10:44 p.m., the phone activated a cell site in the Las Vegas metropolitan area.

Defense

The defense presented witnesses to impeach B.W. To this end, J.N. testified that she dated and was engaged to B.W. from 2009 through early 2015. In early 2011, she learned that B.W. was growing and selling marijuana with other individuals out of his rented home. She witnessed hundreds of marijuana plants in his house and materials for

growing and cultivating the marijuana. She observed him selling the marijuana from the home in large quantities and having it shipped via FedEx to various locations. She also saw him at other locations where he was growing marijuana. B.W. continued the above efforts at least through 2014. During 2013 and 2014, B.A. joined B.W. in the business and J.N. saw them packaging and shipping marijuana together. J.N. also heard B.W. talking to Jesse about the marijuana business. B.W. told J.N. that he was still selling marijuana in 2015.

J.N. also detailed various incidents of domestic violence by B.W. in 2014 and 2015. In one of the final incidents, B.W. told her that he was going to take all her belongings while physically hitting her. B.W. repeatedly threatened her and eventually took her possessions from the house they were living in. J.N. recorded several conversations with B.W. during which he violently threatened her, and those recordings were played for the jury. B.W. lied to the police about these incidents.

I.S. testified that he was partnered with B.W. in a retail business from 2003 through 2013, but separated from B.W. because he learned that B.W. was growing and distributing marijuana, including shipping it with FedEx.

DISCUSSION

I

VOLUNTARY INTOXICATION INSTRUCTION

A. Grizzle's Contentions

Grizzle argues the trial court improperly instructed the jury regarding voluntary intoxication because the subject instruction did not adequately explain that the jury could

consider Grizzle's voluntary intoxication prevented him from forming the required intent and knowledge to aid and abet or conspire to commit burglary, robbery, or attempted robbery. In addition, Grizzle claims the voluntary intoxication instruction provided to the jury did not adequately explain how voluntary intoxication applied to burglary. Finally, Grizzle contends the trial court did not properly respond to the jury's question about voluntary intoxication.

B. Background

In discussing jury instructions, Grizzle's trial counsel requested an instruction regarding voluntary intoxication. She maintained the instruction applied to "specific intent crimes," and explicitly referenced "the robberies, the residential burglaries, and the attempted robberies[.]" The prosecutor disagreed, asserting there was not sufficient evidence of intoxication to warrant a voluntary intoxication instruction. The prosecutor also argued that if the court was inclined to give a voluntary intoxication instruction, it would only be applicable to "the uncharged crime of attempted robbery" of B.A. but as to the other, charged crimes, they had been completed before there was any evidence that Grizzle had ingested alcohol or drugs.

The court agreed with the prosecution on the burglary offense because "the crime was committed when they burst in the door" and there was no evidence of any intoxication prior to that act. However, the court found there was some evidence that drinking and smoking occurred, and consequentially, a voluntary intoxication instruction was required for the robbery and attempted robbery offenses.

The court therefore instructed the jury regarding voluntary intoxication per CALCRIM No. 3426 as follows:

> "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the required specific intent with regard to robbery, attempted robbery and burglary, as described below. [¶] A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] In connection with the charge of robbery, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to permanently deprive the owner of his property. If the People have not met this burden, you must find the defendant not guilty of robbery. [¶] In connection with attempted robbery, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to commit robbery. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

During jury deliberations, the jury submitted the following question to the court: "How do we apply voluntary intoxication PC 29.4? It is not mentioned on any of the verdict forms." The court responded, "CALCRIM 3426 explains how you may consider the evidence, if any, of voluntary intoxication. You are not asked to make any special findings on the subject on the verdict forms."

C. Standard of Review and General Legal Principles Regarding Jury Instructions

" '[T]he trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case.' (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) In addition, 'a defendant has a right to an instruction that pinpoints the theory of the defense [citations]; however, a trial judge must only give those instructions

which are supported by substantial evidence. [Citations.] Further, a trial judge has the authority to refuse requested instructions on a defense theory for which there is no supporting evidence.' (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.) 'A party is not entitled to an instruction on a theory for which there is no supporting evidence.' (*People v. Memro* (1995) 11 Cal.4th 786, 868.)" (*People v. Roldan* (2005) 35 Cal.4th 646, 715 (*Roldan*).)

An instruction on voluntary intoxication is a " 'pinpoint' " instruction that may be given upon request. (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.) A defendant who requests a voluntary intoxication instruction is entitled to one " 'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent." ' " (*Roldan*, *supra*, 35 Cal.4th at p. 715, quoting *People v. Williams* (1997) 16 Cal.4th 635, 677.) Thus, in *Williams*, there was no basis to instruct on voluntary intoxication where a witness testified that the defendant was " 'probably spaced out' " on the morning of the killings, and the defendant made statements to police in an interview that he was " 'doped up' and 'smokin' pretty tough then' " referring to around the time of the killings. Further, even if this "scant" evidence was substantial, there was "no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent." (*Id*. at pp. 676-678.)

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

D. Analysis

Grizzle insists that the voluntary intoxication instruction was incomplete because it failed to identify the specific intent required for burglary and failed to explain how the instruction applied to aiding and abetting and conspiracy. We address his claim as to burglary first.

Here, it appears the court mentioned burglary in the context of CALCRIM No. 3426 by mistake. Indeed, in discussing the possibility of instructing the jury under CALCRIM No. 3426, the court specifically stated that such an instruction would not be relevant to the burglary offense because that crime was committed when Grizzle and the rest of the perpetrators entered the Tommy Drive residence. We agree with the trial court that a voluntary intoxication instruction would not have applied to the burglary offense.

"[T]he substantive crime of burglary is defined by its elements as: (1) entry into a structure, (2) with the intent to commit theft or any felony." (*People v. Anderson* (2009) 47 Cal.4th 92, 101, citing § 459.) There is no evidence in the record that Grizzle was intoxicated before he entered the Tommy Drive residence. And, at the point he entered that residence, the crime of burglary was complete. (See *Anderson*, at p. 101.) Thus, a voluntary intoxication instruction had no application to the burglary offense, and Grizzle offers no cogent argument to the contrary. Thus, although the court mentioned burglary in the context of CALCRIM No. 3426, the court did not err when it did not further instruct the jury how voluntary intoxication applied to burglary. That instruction was not pertinent to the burglary offense.

Finding no error associated with the voluntary intoxication instruction as it relates to burglary, we turn to Grizzle's argument that the instruction was incomplete because it do not explain how voluntary intoxication impacts aiding and abetting as well as conspiracy. In support of his position, Grizzle relies on *People v. Mendoza* (1998) 18 Cal.4th 1114 (*Mendoz*a). In that case, our high court concluded that defendants "may present evidence of intoxication solely on the question whether they are liable from criminal acts as aiders and abettors." (*Id.* at p. 1133.) Thus, under *Mendoza*, a trial court "might simply instruct that the jury may consider intoxication in determining whether a defendant tried as an aider and abettor had the required mental state." (*Ibid*.) In the instant matter, because the court did not instruct the jury that it could consider voluntary intoxication as to aiding and abetting, Grizzle contends the court erred under *Mendoza*.

However, in arguing that *Mendoza*, *supra*, 18 Cal.4th 1114 applies here, Grizzle neglects to consider the facts of that case. In *Mendoza*, a defendant (Juan Valdez) was convicted of criminal offenses as an aider and abettor of the person who directly perpetrated the crimes. (*Id.* at p. 1118.) At trial, he offered evidence that he drank eight to 10 beers on the night the crimes were committed. (*Id.* at p. 1119.) Additionally, an expert witness testified regarding the effects of alcohol, opining that "intoxication can cause memory lapses, and these memory losses are likely to be incomplete so that the person remembers fragments of events." (*Id.* at p. 1121.) Here, there was no analogous evidence. Grizzle did not testify at trial about the amount of alcohol and/or drugs he ingested on the night in question. No other witness testified that Grizzle was intoxicated. Grizzle does not point to any expert witness who testified about the effects of alcohol or

drugs. At most, there was evidence that Grizzle's DNA was found on a beer bottle that was two-thirds full. And there was evidence that Grizzle's DNA, along with two others, was on the mouth area of the meth pipe. This evidence hardly seems sufficient to justify the trial court giving a voluntary intoxication instruction. (See *People v. Memro, supra,* 11 Cal.4th at p. 868.) Indeed, Grizzle has not pointed to any substantial evidence adduced at trial showing he was voluntarily intoxicated and the intoxication affected his formation of specific intent. As such, on the record before us, we conclude the evidence did not warrant the giving of a voluntary intoxication instruction. (See *Roldan, supra,* 35 Cal.4th at p. 715.)

Further, even if we were to assume the voluntary intoxication instruction was incomplete as Grizzle claims, we nevertheless would not find any prejudice. Any error in a voluntary intoxication instruction would have the effect of excluding defense evidence and is thus subject to the usual standard for state law error—i.e., " 'the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant.' " (*Mendoza, supra,* 18 Cal.4th at pp. 1134-1135, quoting *People v. Humph*rey (1996) 13 Cal.4th 1073, 1088; see *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 187 [even assuming trial court's instructions on voluntary intoxication and aiding and abetting were inadequate, it was not reasonably probable that different instructions would have resulted in a verdict more favorable to defendants].) The asserted errors in the instruction were not prejudicial to Grizzle because there was no evidence that he was intoxicated and that intoxication prevented him from forming the

required intent. Thus, on the record before us, we find no reasonable probability that the alleged error adversely affected the verdict as to Grizzle.[7]

E. The Court's Response to the Jury's Question

Grizzle also contends that the court improperly responded to the jury's question regarding voluntary intoxication. Section 1138 provides that when jurors "desire to be informed on any point of law arising in the case" "the information required must be given." "Section 1138 . . . thereby creates a ' "mandatory" duty to clear up any instructional confusion expressed by the jury.' " (*People v. Loza* (2012) 207 Cal.App.4th 332, 355, quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) "This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. . . . But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d

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[7] Grizzle argued that the mental state at issue in conspiracy is similar to that required as an aider and abettor. Thus, the voluntary intoxication instruction here also needed to inform the jury how it applied to conspiracy. This argument fails for the same reasons as does Grizzle's aiding and abetting argument.

68, 97.) We review for an abuse of discretion any error under section 1138. (*People v. Eid* (2010) 187 Cal.App.4th 859, 882.)

Here, we do not conclude the trial court abused its discretion in responding to the jury's question. After receiving the question, the court explained to the attorneys that it interpreted the jury's question as asking whether the jury needed to make a specific finding on the issue of voluntary intoxication: "[T]he question puzzled me a bit, but I note that the voluntary intoxication instruction was at the end of the packet following all the instructions that talked about the elements of the crimes. And since it also at the top has a Penal Code reference, they may have thought it is something they had to make a finding on." The court then stated it had crafted a response but preferred the prosecution's suggestion more than its own. It then provided the attorneys with the proposed response: "CALCRIM 3426 explains how you may consider evidence, if any, of voluntary intoxication. You are not asked to make any special findings on the subject of the verdict forms."

The court then asked Grizzle's trial counsel for any alternative suggestions. She responded: "My recommendation is that the Court instruct the jury that the crime of robbery and burglary require a specific mental state as indicated in the CALCRIM number -- which I don't have at this moment -- and then to say voluntary intoxication to assist you in your determination of whether the mental state required existed, and then utilize the district attorney's last -- their response."

The court declined to use defense counsel's suggestion but indicated if the jury had additional questions regarding how to apply the voluntary intoxication question, it could

ask, and the court would "consider getting more specific about which crimes and which elements it applies to."

Here, the court interpreted the jury's question as inquiring whether it had to make a specific finding as to voluntary intoxication. As such, the court's response was reasonable. Nonetheless, even if we were to assume the court abused its discretion in responding to the question, any such error would be harmless because there was scant evidence that Grizzle was intoxicated and, as such, was unable to form the required specific intent to be convicted of the charged crimes.

II

EXCLUSION OF EVIDENCE THAT B.W., B.A., AND THE TOMMY DRIVE RESIDENCE WERE SUBJECTS OF A FEDERAL DRUG INVESTIGATION

A. Grizzle's Contentions

Grizzle argues the trial court prejudicially erred in excluding evidence of a DEA investigation of B.W., B.A., and the Tommy Drive residence. Grizzle insists such evidence was necessary to his case because "[t]he entire defense was centered on convincing the jury that B.W. and the other tenants at the house created a cloud of deceit that generated reasonable doubt as to how the shooting occurred, why [Grizzle] was actually at the house, and what if any role [Grizzle] had in the crimes that occurred." Alternatively stated, the subject crimes were committed in context of a drug ring, while Grizzle, if he was there at that time, was merely drinking and smoking methamphetamine.

The People argued the court properly exercised its discretion under Evidence Code section 352. They contend the court allowed evidence to be presented at trial that B.A. sold drugs, but assert that evidence regarding the extent of his involvement in drug trafficking was irrelevant. Regarding B.W., the People admit he was the subject of a DEA investigation, but note that the investigation did not uncover any evidence that B.W. was involved with B.A. in drug trafficking. The People therefore conclude that the court properly precluded defense counsel from cross-examining witnesses about the investigation and calling DEA agents to testify. According to the People, such proceedings, if they had been allowed, would have been unduly time consuming, caused confusion, and invited speculation as to B.W. The People have the better argument.

B. Background

The prosecution filed a motion in limine to exclude, under Evidence Code sections 210 and 352, any reference to an incident wherein B.W. sold marijuana to James P. in 2014. The prosecution cautioned the court that questioning regarding this incident could lead to a mini-trial.

Grizzle's counsel opposed the prosecution's motion in limine, arguing that the evidence was relevant to impeach B.W. Specifically, defense counsel contended the DEA report would show that B.W. sold marijuana to James P. and support the defense theory that B.W. had several marijuana grows in San Diego. In addition, Grizzle's counsel wanted to offer into evidence that B.W. was charged with misdemeanor spousal battery, violating a protective order, and grand theft in 2015. Finally, defense counsel asserted that the DEA investigation of B.W. from 2014 to 2016 showed that B.W. "was

intimately involved in the sales/trafficking/distribution of large amounts of marijuana with [B.A.]"

In a reply brief, the prosecution explained that the defense had misrepresented facts about the DEA investigation. Although James P. claimed B.W. sold him marijuana in 2014, there was no evidence connecting this sale to B.A., who was incarcerated at the time. The DEA agents did not observe B.W. transporting or handling marijuana for sale. B.W. had not been arrested or even questioned about B.A.'s activities.

The prosecution argued that the only evidence that B.W. was involved in selling drugs was James P.'s claim that he bought marijuana from B.W. However, it was unclear how much marijuana B.W. allegedly sold to James P. Accordingly, it was also unclear whether B.W. had committed a crime of moral turpitude. Moreover, proving that B.W. sold marijuana to James P. would result in an undue consumption of time and confusion of the issues.

Additionally, the prosecution asked the court to deny Grizzle's request to admit the prior bad acts of B.A. under the guise of impeaching B.W. The prosecution represented that it did not intend to ask B.W. whether he believed B.A. was a small time drug dealer and did not intend to suggest that B.A. was a law abiding citizen.

The court entertained lengthy oral argument regarding the prosecution's motion in limine. During that argument, the court summed up the prosecution's argument that the evidence was not relevant and would be time consuming, speculative, and confusing. In addition, the prosecution emphasized that the evidence would require a "[m]initrial within a minitrial." It also stated that B.W.'s attempt to sell marijuana occurred in 2014,

two years before the events in question. Moreover, there was no indication how much marijuana B.W. tried to sell.

In response, Grizzle's counsel argued that the evidence established that B.A. and B.W. were working together to sell marijuana and were both under DEA surveillance for two years. Defense counsel represented that the evidence supported Grizzle's theory of the case that the Tommy Drive residence was a "house of drug sales, drug use" and "that everyone in that house, and including [B.W.], [was] involved in the sales and grow of the marijuana." Grizzle's counsel emphasized the "evidence goes to show circumstantially, at the very least, that [B.W.] is involved in the sales of marijuana with [B.A.]"

After listening to additional oral argument, the court agreed with the prosecution, ruling the evidence regarding B.W.'s attempt to sell marijuana to James P. and the DEA surveillance was inadmissible. The court explained:

> "So backing up here, the crime that the jury has to analyze is a charged felony murder from a home-invasion robbery and burglary. And just on that crime itself, whether or not [B.A.] and/or [B.W.] were big-time marijuana dealers, small-time marijuana dealers, not marijuana dealers at all doesn't really change the facts and the nature of the crime. Whether they were any of those things, under the facts as the People allege them, it's a felony murder home-invasion robbery. So the only reason any of this would come into evidence, I think, is if its purpose is to -- if it has a role in impeachment of a witness on a material point or if there's some other aspect of it that bears on this. [¶] Certainly, the defense will be able to have in evidence what is found at the home, if there's grows there, if there's other drugs. And [B.W.] was even asked about did he see engaging in drug sales. I think that's fair game, but then to go beyond that as to what -- at least from what the offer of proof is in the reports that I have -- is very speculative to be concluding, that [B.W.] was involved in any of this. And it would be an extreme undue consumption of time. It would be confusing. It would not be particularly relevant. And to the extent it is relevant, it would be

> unduly prejudicial and it would just cause the jury to speculate on a lot of things that aren't really the heart of the issues before them. [¶] So at this point I would be ruling that attempting to impeach [B.W.] or present evidence of [B.W.]'s surveillance of [B.W.] or any of that based on what we have so far -- I would exclude that."

As Grizzle frames the trial court's ruling here, his attorney was permitted to "directly question [B.W.] and others concerning their participation in drug offenses, but" she was not allowed to mention the DEA report and investigation. Thus, much of the focus of Grizzle's argument is that his attorney could not use the DEA report and investigation to support his theory of defense. Surprisingly, in his opening brief, Grizzle did not explain what was contained in the DEA report and illuminate why that specific information was critical to his defense. Instead, Grizzle refers to the DEA report in general terms and, based on those generalities, argues it was essential to his case.

In contrast, the People offer a summary of "the known facts of the DEA investigation[.]" Grizzle does not take issue with the People's summary, which is as follows:

> "In December 2014, a source from New York made a 'proffer' that he purchased marijuana from [B.W.], who lived off of Sassafras and had several marijuana grows in San Diego.
>
> "In July 2015, the DEA opened an investigation into [B.A.] and any co-conspirators who were distributing marijuana.
>
> "On August 18, 2015, [B.A.] was seen leaving his home on Tommy Drive, and a few minutes later, [B.W.] was seen leaving the home. [B.W.] was followed by agents to Ocean Beach, where it was determined he went into his dentist's office. That same day, [B.A.] was captured on video mailing packages of marijuana at the postal office near his home.

"On September 3, 2015, agents observed [B.A.] and another male leave the Tommy Drive home and drive throughout the county, changing lanes abruptly on city streets for about an hour.

"On September 23, 2015, agents observed [B.W.] go from the Tommy Drive home into his SUV with possibly a large envelope, which he placed in the backseat before driving away. Agents followed [B.W.] to Mission Valley, lost sight of him in a Del Taco parking lot, but then regained sight of him again. [B.W.] then drove to a parking lot in the Bay Park area where he met up with a shirtless individual for about one minute before returning to his SUV and driving to La Jolla. [B.W.] pulled into a parking lot and agents terminated their observations.

"In September 2015, agents put a tracker on [B.W.]'s SUV. The SUV was tracked to Denver, Colorado. At one point, [B.W.]'s SUV was parked near two marijuana stores and did not move for a couple of weeks. In November, the SUV began to travel toward the Las Vegas area. The SUV was stopped by police at the request of the agents. The agents learned that [B.W.]'s attorney was driving the SUV home to San Diego because [B.W.] was in custody in Denver, serving a sentence for a domestic violence charge. The tracker was removed on November 16, 2015.

"On February 2, 2016, an agent observed [B.W.] on the driveway of Tommy Drive. At this time, the agents suspected that [B.W.] and [B.A.] were involved in sending marijuana through the United States Postal Service. Two individuals were arrested when receiving one of two intercepted packages sent by [B.A.] One of these individuals told agents she was working with [B.A.] and would receive the marijuana and later send [B.A.] cash.

"On March 2, 2016, agents observed a male leave the Tommy Drive home, go into the front passenger area of a Lexus for a brief period, and then return to the home.

"On March 3, 2016, agents watched [B.A.] and two others unload items from a trailer and take the items into the Tommy Drive home. [B.A.] and one of the males left in a van. The agents followed the van to a center where driving under the influence classes are taken. [B.A.] went into the center and came back to the van about ten minutes later. The van drove to a business called Ocean Enterprises. Both men entered the business and came out with scuba tanks. The

> men then went to Wings and Things and met up with two other men. The two other men followed [B.A.] back to the Tommy Drive home. These men were seen taking objects such as a bean bag into the home. The car that followed [B.A.] was registered to [S.P.]"

At the beginning of trial, the court ruled that the defense could ask investigating police officers whether they believed that the residents of the Tommy Drive residence might be involved in drug sales but could not ask about underlying details of the DEA investigation. Later, the court reiterated that although it was appropriate to allow the jury to know that investigating detectives had in mind the concept that some people in the house may have been selling drugs, it would be inappropriate for the jury to learn what each detective knew about the DEA investigation. The court stated that the DEA investigation into B.W. was inconclusive because the surveillance of B.W. did not turn up anything.

C. Analysis

A trial court has "considerable discretion" in determining the relevance of evidence. (*People v. Williams* (2008) 43 Cal.4th 584, 634.) In addition, relevant evidence may be excluded under Evidence Code section 352 if its probative value is "substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Harrison* (2005) 35 Cal.4th 208, 229.) A trial court has broad discretion to exclude evidence under Evidence Code section 352. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

We review relevancy and Evidence Code section 352 rulings for abuse of discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) A trial court's evidentiary rulings admitting or excluding evidence are reviewed for abuse of discretion, " ' "and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Geier* (2007) 41 Cal.4th 555, 585.)

Here, Grizzle has not satisfied his burden in showing that the trial court ruling to exclude the DEA investigation evidence was arbitrary, capricious, or patently absurd. He contends that the subject evidence "would have materially impacted the jury's view of the case and the defense theory that [Grizzle] could have been at the house for reasons other than as advanced by the prosecution." Yet, Grizzle does not explain how the DEA investigation evidence was critical or necessary to his theory of defense. Indeed, the record before us allowed Grizzle's trial counsel to argue this theory to the jury. For example, during closing argument, defense counsel suggested to the jury that it was possible that Grizzle and the other men were invited over to the house to deal and distribute drugs, were hanging out at the house, and then "stuff went bad and [B.A.] was killed."

Even in the absence of the DEA investigation evidence, other evidence was presented at trial that B.A. grew marijuana and sold it out of the house and that strangers would come by the house. On cross-examination, B.W. testified that he saw B.A. selling marijuana inside the home. B.W. also admitted that he saw people he did not know coming inside the home and saw people come over, drink beer, smoke marijuana, and

buy it. S.P. testified that "little sprouts" of marijuana were on the back patio, and he believed B.A. (or one of the other housemates) might have been growing them. In addition, a "pay-and-owe sheet" was discovered in the Guess bag. Pay-and-owe-sheets are a type of balance sheet sometimes kept by people involved in drug dealing. Thus, the evidence proffered at trial provided support for Grizzle's theory of defense. Drugs were sold at the Tommy Drive residence. Some marijuana was grown there. Here, Grizzle does not lucidly explain how the DEA investigation evidence would lend credence to his defense theory. After all, the scenario proposed by the defense theory (that Grizzle and the other men came to the house to engage in some sort of drug transaction and hang out, not to burglarize the house and rob the residents) would be just as likely whether a small drug operation or a large one was run from the house.

Grizzle also insists that the DEA investigation evidence would have served to impeach B.W., a key prosecution witness. Nevertheless, he does not explain what specifically in the evidence excluded would have impeached B.W. Grizzle does not argue that any information in the DEA report linked B.W. or any of the other housemates to B.A.'s distribution of marijuana. Although DEA agents conducted surveillance of B.W. and even tracked his car, they did not see him handling or transporting marijuana for sale. James P. told DEA agents that he purchased marijuana from B.W. But there is no evidence that this alleged transaction was linked to B.A., who was incarcerated at the time.

Further, Grizzle does not claim that the DEA investigation uncovered evidence linking B.W. and/or the other housemates to B.A.'s drug transactions. Instead, Grizzle

implies that the defense should have been provided with the opportunity to explore this possibility: "The defense was not permitted to call the actual officers involved in that investigation or explore the documentation [the defense] had been provided by the prosecution." Such a fishing expedition at trial certainly would have been time consuming, confusing, and might unfairly prejudice the jury against B.W. and the other housemates. Moreover, just to provide the necessary foundation to engage in such a fishing expedition during the trial would require a mini-trial that would serve no real purpose but to unnecessarily complicate the issues before the jury. Such evidence is precisely the type of evidence a court has broad discretion to exclude under Evidence Code section 352.

In summary, Grizzle has not shown the court abused its discretion in precluding the DEA investigation evidence. Clearly, that evidence is the type that should be excluded under Evidence Code section 352. Further, it does not even appear to be relevant. As Grizzle admits in his opening brief: "Here, defense counsel was permitted to question [B.W.] and [S.P.] about their and [B.A.]'s participation in the narcotics trade (which they completely denied), question the various law enforcement officers about whether they were generally told that some undefined investigation was ongoing regarding the Tommy Drive home, and present impeachment evidence regarding [B.W.]'s voluminous lies." The trial court properly exercised its discretion in prohibiting the DEA investigation evidence, an investigation that does not appear to help connect B.W. with B.A. beyond what was presented at trial. On the record before us, we cannot say the

court's ruling was arbitrary, capricious, or patently absurd and resulted in a manifest miscarriage of justice. (*People v. Geier*, *supra*, 41 Cal.4th at p. 585.)

III

EVIDENCE REGARDING THE ARRESTS OF NIEBER AND JOHNSON

A. Grizzle's Contentions

Grizzle contends the trial court prejudicially erred by admitting evidence regarding the arrest of Nieber and Johnson, both of whom were involved in high speed car chases leading to their arrests. Grizzle argues that such evidence was irrelevant and prejudicial under Evidence Code section 352.

B. Background

Grizzle's trial counsel filed a motion in limine to exclude evidence relating to the arrests of Johnson and Nieber. Counsel argued that such evidence was not relevant, and its possible probative value would be substantially outweighed by prejudice to Grizzle.

The prosecution opposed Grizzle's motion in limine, asserting that the circumstances of Johnson's and Nieber's arrests showed a connection among Johnson, Nieber, and Grizzle. Johnson was arrested after a high speed chase, driving the vehicle that Grizzle registered at the Day's Inn one day before the murder. In addition, the car contained documents with the name Rachelle Stewart on them. Three days later, Nieber also fled from the police in a high speed chase and crashed his vehicle. Grizzle left San Diego the same day Nieber was arrested and never returned to San Diego.

At a hearing on the motion in limine, defense counsel argued that her primary objection to the evidence of the arrests was with respect to the high speed chases and any

failure to obey police requests. The court ruled that the fact that a chase occurred bore on the "consciousness of guilt of Johnson, which then has circumstantial evidence to just show that all three of them, to the extent they're showing consciousness of guilt, were in this together." The court found "the same relevance on consciousness of guilt" existed as to Nieber's arrest as well. However, the court ruled that it would be unduly prejudicial to allow the jury to hear details of the high speed chases and limited the testimony to the fact that there was a chase and the car stopped or crashed.

C. Analysis

Although a trial court has broad discretion to determine the relevancy of evidence (*People v. Williams*, *supra*, 43 Cal.4th at p. 634), here we are concerned about the tenuous connection among the arrests of Johnson, Nieber, and Grizzle. None of the individuals were together when they were arrested. Thus, we struggle to see how the circumstances of Johnson's or Nieber's arrest had any bearing on Grizzle's guilt. We agree that Johnson's attempt to evade the police shows his consciousness of guilt, but it has little relevance to Grizzle's consciousness of guilt. The same analysis applies to the evidence of Nieber's arrest.

However, the People argue that Johnson's and Nieber's respective police chases at the time of their respective arrests were relevant. They claim Grizzle, like Johnson and Nieber, exhibited consciousness of guilt because he fled to Las Vegas, and, as such, if all three men exhibited consciousness of guilt, such evidence would be circumstantial evidence that the three men committed the crimes at the Tommy Drive residence together. We find this purported connection among the three men's respective arrests

somewhat thin. Nevertheless, we agree with the People that there was a significant amount of other evidence that does connect the three men to the subject crimes, which is not of questionable relevancy. As such, even if we were find that the trial court abused its discretion in admitting the evidence of the arrests of Johnson and Nieber, such error would be harmless.

We review claims that the trial court erred in admitting prejudicial evidence under the harmless error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *People v. Alcala* (1992) 4 Cal.4th 742, 773.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, at p. 836.) Probability under *Watson* "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 918.) Appellate review under *Watson* "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

Under the *Watson* harmless error standard, it is an appellant's burden to show that it is reasonably probable that he would have received a more favorable result at trial had

the error not occurred. (*Watson, supra,* 46 Cal.2d at p. 836.) Grizzle has not satisfied his burden here. Instead of explaining how the admission of evidence was prejudicial to his case, he merely incorporates his arguments of prejudice regarding the alleged jury instruction error and the alleged error in prohibiting the DEA investigation evidence from earlier in his opening brief. In doing so, Grizzle neglects to explain how he was prejudiced by the admission of evidence of Johnson's and Nieber's arrests.

In addition, as the People point out, at trial, the prosecutor presented minimal evidence of the police chases and did not argue that Johnson's or Nieber's consciousness of guilt could be attributed to Grizzle. Further, Grizzle's claim of prejudice here neglects to consider the other evidence connecting Grizzle to Johnson and Nieber as well as the crimes at the Tommy Drive residence. There was significant DNA evidence establishing Grizzle was at the Tommy Drive residence, including his DNA on a beer bottle, pipe, ski mask, and gloves. When Johnson was arrested, he had been driving a Monte Carlo. Grizzle had registered that same car when he stayed at a hotel in La Mesa. A folder with hospital documents pertaining to Rachelle Stewart was found in the Monte Carlo. When Grizzle was arrested in Las Vegas, a woman named Rachelle Stewart was staying in his hotel room. In short, the admission of the evidence of Johnson's and Nieber's arrests was not prejudicial to Grizzle.

IV

SUBSTANTIAL EVIDENCE

A. Grizzle's Contentions

Grizzle maintains that substantial evidence does not support his convictions for felony murder, robbery, and burglary. In his supplemental brief, Grizzle argues his conviction for felony murder must be conditionally reversed because of Senate Bill No. 1437, which "significantly limits felony murder liability and fundamentally changes the elements that will be applicable to the rule after January 1, 2019." We will address this issue as well when we discuss Grizzle's substantial evidence challenge below.

B. Standard of Review

When considering a defendant's challenge to the sufficiency of the evidence, we review the entire record most favorably to the judgment to determine whether the record contains substantial evidence from which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. We do not reweigh evidence or reassess a witness's credibility and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We ask whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the allegations to be true beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

C. Burglary and Robbery

"The elements of first degree burglary . . . are (1) entry into a structure currently being used for dwelling purposes . . . (2) with the intent to commit a theft or a felony." (*People v. Sample* (2011) 200 Cal.App.4th 1253, 1261; §§ 459, 460.) Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; see *People v. Clark* (2011) 52 Cal.4th 856, 944.) The elements of robbery are (1) the defendant took property that was not his or hers; (2) the property was taken from another person's possession and immediate presence; (3) the property was taken against the person's will; (4) the defendant used force or fear to take the property or to prevent the person from resisting; and (5) when the defendant used force or fear to take the property, the defendant intended to remove it from the owner's possession for such an extended period of time the owner would be deprived of a major portion of the value of the property. (*Id.* at p. 943.)

The People claim that the evidence supports Grizzle's conviction for burglary and robbery as a direct perpetrator as well as an aider and abettor or on conspiracy grounds. Proof of aider and abettor liability requires evidence in three distinct areas: (1) the direct perpetrator's actus reus—a crime committed by the direct perpetrator; (2) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends; and (3) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

Direct evidence of the defendant's mental state is rarely available and may be shown with circumstantial evidence. (*People v. Beeman* (1984) 35 Cal.3d 547, 558-559.) Factors that may be considered include presence at the scene of the crime, companionship, and conduct before and after the offense. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5; *People v. Mitchell* (1986) 183 Cal.App.3d 325, 330.)

Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act by one person in furtherance of the conspiracy. (*People v. Homick* (2012) 55 Cal.4th 816, 870.) Conspiracy requires the intent to agree, and the intent to commit the underlying substantive offense. (*Ibid*.) " 'The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.' " (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1135.)

Grizzle's primary argument is that the prosecution did not prove he had the specific intent to commit burglary or robbery. He claims that his intent cannot be inferred by the mere fact that the crimes occurred at a place where he was present. (See *People v. Terry* (1970) 2 Cal.3d 362, 401-402.) In support of his position, Grizzle characterizes the instant matter as a "DNA only" case. In doing so, he sums up the evidence as insufficient to convict him of any crime. He claims there was no proof of his "actual participation in the crimes." Grizzle emphasizes that his DNA was not found on any of the rolls of tape used to bind B.W. or S.P., he was not the gunman, he was not the person at the ATM, and he was never mentioned by name. He further notes that no witness identified him.

We agree with Grizzle that the case against him was highly circumstantial. However, we disagree that this was a DNA only case.[8] DNA evidence did show that Grizzle was in the Tommy Drive residence. Grizzle's DNA was found on the mouth area of the beer bottle on the kitchen counter, the black knit mask, the glass meth pipe, the lighter by the pipe, the black glove found in the street, the disposable glove in the Guess bag, the other disposable glove on the toolbox, and the bloodstain on the doorknob of the front door. However, that was not the only evidence supporting Grizzle's conviction.

Sprint business records showed that three times between 1:00 and 3:00 p.m. on May 11, Grizzle's cellphone utilized a cell tower 500 feet from the Tommy Drive residence. This evidence implies that Grizzle was at or near the Tommy Drive residence at the time the crimes took place.

Additionally, there was evidence connecting Grizzle to Johnson and Nieber. For example, there was compelling evidence that Nieber and Johnson were two of the intruders. Nieber was captured by video surveillance driving B.W.'s car and attempting to utilize B.W.'s cards at a U.S. Bank. In addition, Nieber's DNA was on the mouth area of the beer bottle found in the front living room and on the glass pipe. B.W. heard someone refer to "Larry" saying that the PIN number was wrong. Johnson's DNA was on the glass pipe as well as on the roll of painter's tape and a piece of tape from B.W.'s wrist.

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8 Because we do not conclude this is a "DNA only" case, we do not find Grizzle's reliance on *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353 to be persuasive.

The evidence placed Grizzle at the Tommy Drive residence with Nieber and Johnson. B.W. and S.P. heard the intruders "roasting" drugs. The DNA of Grizzle, Nieber, and Johnson was on the mouth of the pipe. B.W. testified that he did not recognize the pipe or the green lighter and that none of the residents of the house smoked methamphetamine.

B.W. and S.P. also heard the intruders comment about the beer in the refrigerator and heard beer bottles being opened. The open beer bottles in the kitchen and on the floor of the living room were not there before the burglary. Thus, this evidence suggests that Grizzle and Nieber were drinking beer while the crimes were being committed.

Grizzle's connection with Johnson was further confirmed by the fact that Johnson was arrested while driving the Monte Carlo that Grizzle had registered at the Days Inn a day before committing the crimes. The Monte Carlo contained paperwork for Rachelle Stewart, who was later found in the Las Vegas motel room where Grizzle was staying.

In addition to establishing that Grizzle was at the Tommy Drive residence with Nieber and Johnson on May 11, the evidence suggests that Grizzle intended to commit burglary and robbery and actively participated in the crimes. Grizzle's DNA was found on a ski mask, which would cover his face, and gloves, which would prevent him from leaving fingerprints. B.W. did not recognize the gloves or the mask. Based on the items bearing Grizzle's DNA, a reasonable juror could infer that Grizzle knew what was going to occur at the Tommy Drive residence (a burglary and robbery), was prepared to assist in committing those crimes, and intended to take part in the unlawful acts.

Further, a shared criminal purpose can be inferred from the way the men invaded the house and their coordinated actions thereafter. The gunman and the other intruders entered the house in a unified show of force; they came in a single file and immediately ordered S.P. to the ground and began asking him questions about B.A. and the location of money and marijuana. Similarly, a group of men were waiting for B.W. when he came through the front door, and they forced B.W. to the ground and questioned him about B.A., money, and marijuana. There is no evidence that any of the men, other than Nieber (who left the house to try to withdraw money using B.W.'s cards), left the house before the others. Nor is there any evidence that any of the men in the group came to the house after the initial entry into the house.

The evidence also intimates that Grizzle took part in ransacking the house and keeping an eye on B.W. and S.P., who were lying on the floor of the front living room. One of the disposable gloves bearing Grizzle's DNA was in the Guess bag, which also contained a checkbook ledger and the pay-and-owe sheet. Another disposable glove with Grizzle's DNA on it was on top of a tool box. The tool box was next to the couch holding the flat screen TV, which had been removed from the back living room. The beer bottle that Grizzle drank from was in the kitchen, where multiple suitcases were strewn.

Also, B.W. thought he could hear someone right above him at the computer desk, rummaging through B.A.'s paperwork and asking questions about it. B.W. also heard the man at the computer desk using the meth pipe. The ski mask with Grizzle's DNA on it was found there.

Based on the evidence in the record, a jury could reasonably infer that Grizzle drank beer and did drugs with Nieber and Johnson as they watched over S.P. and B.W. on the floor of the front living room and waited for B.A. to come home. B.W. believed that the man at the computer desk was sitting because he was there for a long time.

Additionally, Grizzle's conduct postarrest supported his conviction. Although Grizzle was arrested in Las Vegas, upon being placed in the police car, he asked the officer if he was from San Diego (where the subject crimes were committed). During a jail phone call between Grizzle and an unidentified woman, Grizzle asked the woman how she knew that he had a warrant, and the woman explained that she checked two or three times a week. Grizzle said that he looked for the warrant as soon as he hung up but could not find it, and then 20 minutes later, he left the hotel room and was arrested.

Viewing all the evidence in the light most favorable to the prosecution, there was more than sufficient evidence that Grizzle participated in the charged crimes as an aider and abettor and/or a conspirator. Therefore, there is no basis on which to overturn Grizzle's burglary and robbery convictions.

D. Felony Murder[9]

In Grizzle's opening brief, he argues that substantial evidence does not support his conviction for any of the charged offenses. As we discuss above, he focuses on the lack of evidence proving he possessed the required specific intent to commit the crimes.

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9 We separately address Grizzle's conviction for felony murder because, in addition to the substantial evidence challenge to that crime, Grizzle raises an issue in his supplemental brief that only applies to felony murder.

However, during his substantial evidence challenge, he did not specifically address the particular elements of each crime. As such, he did not explicitly discuss why the evidence did not support his conviction for felony murder. As we conclude above, substantial evidence supports his convictions for burglary and robbery.

"Section 189 imposes culpability for first degree murder when a killing is committed during the commission or attempted commission of a statutorily enumerated felony." (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 80.) Robbery is one of the felonies listed in section 189. (See § 189.) The purpose of the felony murder rule "is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing . . . whether intentional, negligent, or accidental, during perpetration or attempted perpetration of the felony." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

Here, for the reasons we conclude substantial evidence supports Grizzle's conviction for burglary and robbery, we also find that the same evidence supports his conviction for felony murder under the law as it existed when he was tried. B.A. was killed during the commission of robbery, and Grizzle therefore was "strictly responsible" for B.A.'s death. (See *People v. Cavitt*, *supra*, 33 Cal.4th at p. 197.)

Yet, the elements of felony murder changed under a new law, effective January 1, 2019. Thus, in his supplemental brief, Grizzle argues that his conviction for felony murder cannot stand in light of Senate Bill No. 1437. That bill amended sections 188 and 189, as relevant here, to "prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs

from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life . . . ." (Legis. Counsel's Dig., Sen. Bill No. 1437 (2017-2018 Reg. Sess.).) The bill also added section 1170.95, which creates a procedure for vacating the conviction and resentencing of a defendant who was prosecuted under a theory of first degree felony murder or murder under the natural-and-probable-consequences doctrine, who was sentenced for first degree murder, and who could no longer be convicted of murder because of the changes made to sections 188 and 189. (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 4.)

Both Grizzle and the People agree that Senate Bill No. 1437 applies retroactively; however, they disagree how it is to be applied here. Grizzle asserts that we should conditionally reverse the judgment as to the felony murder conviction to allow him to use the petition process set forth in section 1170.95. According to Grizzle, if the superior court grants his petition under section 1170.95, his conviction would be vacated, and our conditional reversal would be moot. But if the superior court denies his petition, Grizzle argues our reversal then would stand, and the prosecution could determine whether it will retry the matter.

We see little value in the conditional reversal urged by Grizzle as it renders the petition process under section 1170.95 all but meaningless. If the superior court does not grant Grizzle the relief he seeks in his petition then our conditional reversal would cease

to be conditional and essentially would reverse the superior court's ruling without regard to what occurred in the hearing on Grizzle's petition. In other words, under Grizzle's approach, his desired result under his section 1170.95 petition would be guaranteed by our conditional reversal. Either through our reversal or a successful petition with the superior court, his conviction for felony murder would be vacated. In this sense, although Grizzle asks for a conditional reversal, he really is asking us to reverse his conviction for felony murder under Senate Bill No. 1437. Thus, we must address whether that bill permits an appellate court to vacate a felony murder conviction or if a defendant must first petition for relief per the bill's procedure (as codified in section 1170.95).

Section 1170.95 provides:

> "(a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019. [¶] (b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The

petition shall include all of the following: [¶] (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel. [¶] (2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information. [¶] (c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause. [¶] (d) (1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause. [¶] (2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner. [¶] (3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens. [¶] (e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall

> be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose. [¶] (f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner. [¶] (g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence."

The People argue that this court does not have the authority to take any action under Senate Bill No. 1437 without Grizzle first petitioning the superior court for relief under section 1170.95. In support of their position, the People analogize Senate Bill No. 1437 to Propositions 36 and 47, which both required defendants to follow specific petitioning procedures in the superior court to obtain relief. (See *People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*) [Proposition 36]; *People v. DeHoyos* (2018) 4 Cal.5th 594, 603-604 (*DeHoyos*) [Proposition 47].) We agree with the People.

Our Supreme Court addressed the retroactivity of ameliorative changes to the criminal law in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). In that case, our high court considered statutes that mitigated the punishment for the crime of escape without force or violence. The statutes were enacted after the petitioner committed the offense but before he was sentenced. The court determined that the petitioner was "entitled to the ameliorating benefits" of the new statutes. (*Id.* at p. 744.) "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to

be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.)

The California Supreme Court followed *Estrada* in *People v. Francis* (1969) 71 Cal.2d 66. In *Francis*, the Legislature modified the punishment for possession of marijuana, which had been a straight felony, to permit it to be treated as a misdemeanor. Relying on *Estrada, supra*, 63 Cal.2d 740, the California Supreme Court concluded that this statutory change also applied retroactively to people whose judgments were not yet final. "Here, unlike *Estrada*, the amendment does not revoke one penalty and provide for a lesser one but rather vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty." (*Francis*, at p. 76.) Despite this difference, the court found an inference that the Legislature intended retroactive application "because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Ibid*.)

The Supreme Court recently summarized *Estrada*'s meaning. "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*Conley, supra,* 63 Cal.4th at p. 657; see *People v. Wright* (2006)

40 Cal.4th 81, 94-95 [*Estrada's* inference of retroactivity applies to a newly enacted defense].)

In *Conley, supra*, 63 Cal.4th 646, our high court considered the Three Strikes Reform Act of 2012 (Reform Act or Proposition 36), "which amended the law to reduce the punishment prescribed for certain third strike defendants." (*Conley*, at p. 651.) The court found the inference of retroactivity from *Estrada* inapplicable because the subject legislation included its own retroactivity provision. (*Conley*, at pp. 658-659; § 1170.126, subd. (a).) It permitted persons sentenced under the Three Strikes law, including those whose judgments were final, to seek resentencing and a reduced sentence, but subject to certain conditions. (*Conley*, at pp. 651-652.) Accordingly, the court concluded that people already sentenced, including those whose judgments were not final, were not "entitled to automatic resentencing" without regard to the conditions. (*Id.* at pp. 655-656.) Therefore, an appellate court could not automatically resentence a defendant under Proposition 36 without that defendant first petitioning the superior court under section 1170.126. (See *Conley*, at p. 659 ["[T]o confer an automatic entitlement to resentencing under these circumstances would undermine the apparent intent of the electorate that approved section 1170.126: to create broad access to resentencing for prisoners previously sentenced to indeterminate life terms, but subject to judicial evaluation of the impact of resentencing on public safety, based on the prisoner's criminal history, record of incarceration, and other factors."].)

Recently, the California Supreme Court followed *Conley, supra*, 63 Cal.4th 646, finding that the *Estrada* rule was not applicable to Proposition 47. (*DeHoyos, supra*,

4 Cal.5th at p. 603.) In reaching that conclusion, the court determined that a defendant convicted of a felony must follow the procedures set forth in section 1170.18 to receive the retroactive benefits of Proposition 47. In *DeHoyos*, the defendant was convicted of possession of a controlled substance, a crime that was punishable as a felony at the time of conviction. (*DeHoyos*, at p. 599.) On appeal, the defendant argued that because possession of a controlled substance was a misdemeanor under the newly enacted Proposition 47, the appellate courts—in the first instance—should reduce her conviction to a misdemeanor without following the procedures set forth in section 1170.18. (*DeHoyos*, at p. 600.) The court rejected the defendant's argument, concluding that "resentencing is available to . . . defendants only in accordance with the statutory resentencing procedure in Penal Code section 1170.18." (*DeHoyos*, at p. 597.) In discussing *Conley*, *supra*, 63 Cal.4th 646, the court analogized Proposition 47 to Proposition 36:

> "Like the Reform Act, Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of provisions designed to extend the statute's benefits retroactively. [Citation.] Those provisions include, as relevant here, a recall and resentencing mechanism for individuals who were 'serving a sentence' for a covered offense as of Proposition 47's effective date. [Citation.] Like the parallel resentencing provision of the Reform Act, section 1170.18 draws no express distinction between persons serving final sentences and those serving nonfinal sentences, instead entitling both categories of prisoners to petition courts for recall of sentence. [Citation.] And like the resentencing provision of the Reform Act, section 1170.18 expressly makes resentencing dependent on a court's assessment of the likelihood that a defendant's early release will pose a risk to public safety, undermining the idea that voters 'categorically determined that "imposition of a lesser punishment" will in all cases

"sufficiently serve the public interest." ' [Citations.]" (*DeHoyos*, at p. 603.)

Here, we find *Conley* and *DeHoyos* instructive. Like the Reform Act and Proposition 47, section 1170.95 is "an ameliorative criminal law measure that is 'not silent on the question of retroactivity.' " (See *DeHoyos*, *supra*, 4 Cal.5th at p. 603.) It sets forth a procedure whereby "[a] person convicted of felony murder . . . may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all the following conditions apply . . . ." (§ 1170.95, subd. (a).)[10] Similar to the Reform Act and Proposition 47, section 1170.95 does not distinguish between a defendant whose sentence is final and one who is still challenging his sentence on direct appeal. (See *DeHoyos*, *supra*, 4 Cal.5th at p. 603.) Further, like Proposition 47, under which a successful petition allows the court to reclassify a felony as a misdemeanor and resentence a defendant accordingly (see § 1170.18, subd. (b)), section 1170.95 allows the superior court to vacate a defendant's conviction and resentence him (see § 1170.95, subd. (d)(3)). In short, we conclude section 1170.95 operates similarly to the Reform Act and Proposition 47. Consequentially, this court cannot vacate and resentence Grizzle under section 1170.95. Rather, like a defendant petitioning for relief under the Reform Act or Proposition 47, Grizzle must follow the procedure set forth in section 1170.95 in the first

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10 The Reform Act and Proposition 47 contain similar provisions. (See §§ 1170.126, subd (b), 1170.18, subd. (a).)

instance.[11] (See *Conley*, *supra*, 63 Cal.4th at p. 658; *DeHoyos*, *supra*, 4 Cal.5th at p. 603.)

V

IN CAMERA REVIEW OF COURT EXHIBITS 12 AND 14

A. Grizzle's Contentions

Grizzle asks this court to independently review a sealed DEA report (Court's Exhibit 12), which was produced to the defense in a redacted form (Court's Exhibit 14) for *Brady* material. Specifically, Grizzle requests that we review the sealed materials to determine whether they contain additional details concerning: (1) any of the occupants of the Tommy Drive residence; (2) specific information on B.W. and B.A.; (3) specific information on the names of other possible participants in transactions related to B.W. or B.A.; and (4) any additional information we believe could have been material to the defenses articulated in the opening brief.

B. Background

During discovery, the defense was provided with a redacted DEA report. The report was six pages long and consisted of 15 paragraphs. The redacted report blacked out all the paragraphs except for the first part of paragraph 1 and the entirety of paragraph 8, which set forth James P.'s claim that he purchased marijuana from B.W.

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11 We note that after this case was briefed and argued, an appellate court reached the same conclusion about a defendant's need to first seek relief under section 1170.95 in the superior court. (See *People v. Martinez* (2019) 31 Cal.App.5th 719.)

Defense counsel issued a subpoena duces tecum to the DEA, requesting discovery of the redacted portions of the report that relate to B.W. and this case. The DEA responded that there was no pertinent information in the redacted portions of the report. The prosecutor confirmed that she had read the unredacted report and that none of the other paragraphs had anything to do with B.W. or his housemates.

The court reviewed the unredacted report and determined that the defense should also be allowed to see paragraph 5, which generally related to quantities of marijuana that James P. had purchased. However, there was no mention of B.W. or B.A. in that paragraph. The court stated that there was nothing else in the redacted portions of the report relating to B.W., S.P., J.P., or B.A.

The unredacted DEA report was marked as Court's Exhibit 12 and was filed under seal. The newly redacted report, which revealed paragraph 5 in addition to the previously revealed text, was marked as Exhibit 14 and was filed under seal.

C. Analysis

The federal due process clause prohibits the prosecution from suppressing evidence materially favorable to the accused. The duty of disclosure exists regardless of good or bad faith, and regardless of whether the defense has requested the materials. (*United States v. Agurs* (1976) 427 U.S. 97, 107; *Brady*, *supra*, 373 U.S. 83, 87.)

In *Brady*, the United States Supreme Court held that under the due process clause of the Fourteenth Amendment to the United States Constitution, the prosecution must disclose to the defense any evidence that (1) is "favorable to the accused," (2) "material,"

and (3) was " 'suppressed' by the government." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1047-1048.)

For *Brady* purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. (*United States v. Bagley* (1985) 473 U.S. 667, 674, 676; see *In re Sassounian* (1995) 9 Cal.4th 535, 544.) Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. (E.g., *Banks v. Dretke* (2004) 540 U.S. 668, 699.) Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. (*Bagley*, at pp. 682-683; see *In re Brown* (1998) 17 Cal.4th 873, 887.)

Here, Grizzle requests that this court review the sealed record to ascertain whether any information was incorrectly withheld. The People oppose Grizzle's request, arguing such a review is not warranted because the redacted portions of the DEA report do not constitute *Brady* material. However, we cannot determine whether the People are correct without examining the sealed exhibit. As such, we have reviewed Court Exhibit 12 and compared it to the redacted version in Court Exhibit 14. We conclude there is no *Brady* material that has been redacted. None of the redacted portions relates to the instant matter, including any of the issues raised in Grizzle's opening brief. Thus, there was no *Brady* error.

VI

CUMULATIVE ERROR

Grizzle also contends the cumulative effect of the asserted errors rendered the trial so unfair and unlawful that reversal of the judgment is warranted. Because we hold no

prejudicial errors exist, this cumulative error argument necessarily fails. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 377 [no cumulative effect of errors when no error]; *People v. Butler* (2009) 46 Cal.4th 847, 885 [rejecting cumulative effect claim when court found "no substantial error in any respect"].)

VII

SENATE BILL NO. 1393

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the previous versions of these statutes (in effect at the time Grizzle was sentenced), the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667(a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subdivision (b).)

In his supplemental brief, Grizzle maintains that Senate Bill No. 1393 applies retroactively, and therefore, we must remand this matter for resentencing under the bill. The People concede that Senate Bill No. 1393 is retroactive and agree that we should remand the matter for resentencing. Recently, our colleagues in Division 2 of the Fourth District concluded Senate Bill No. 1393 applies retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We adopt the reasoning of Division 2 here. (See *id*. at pp. 971-973.) Accordingly, we conclude that Senate Bill No. 1393 applies retroactively,

and this matter must be remanded to the superior court for resentencing pursuant to that bill.

DISPOSITON

We vacate Grizzle's sentence and remand this matter to the superior court to resentence Grizzle consistent with this opinion. In all other respects, the judgment is affirmed. This opinion does not restrict any rights Grizzle may have under Senate Bill No. 1437 to petition the superior court for relief.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.